UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. **1:17-cr-36 (MAD)**

JACOB E. EBEL,

Defendant.

APPEARANCES: **OF COUNSEL:**

OFFICE OF THE UNITED STATES ATTORNEY **MICHAEL S. BARNETT, AUSA**
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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

In a four-count Indictment dated February 22, 2017, Defendant was charged with conspiracy to distribute and possess with intent to distribute controlled substances, distribution of controlled substances with serious bodily injury and death resulting from use of the controlled substances, distribution of controlled substances with death resulting from use of the controlled substances, and possession with intent to distribute controlled substances. *See* Dkt. No. 5 at 1-3. In a motion dated January 10, 2019, Defendant seeks the following relief: (1) an order pursuant to Rule 404(b) of the Federal Rules of Evidence requiring the Government to disclose any crime,

wrong or act of Defendant which the Government intends to use at trial for any purpose; (2) an order pursuant to Rule 12 of the Federal Rules of Criminal Procedure suppressing and excluding from the trial of this action any physical evidence seized by law enforcement officers from Defendant's person or residence pursuant to the search warrant executed by law enforcement officers on July 26, 2016, at 6 Rowland Road, Kinderhook, New York; (3) an order pursuant to Rule 12 excluding from use at trial any alleged inculpatory statement or admission, whether written or oral, that was involuntarily made by Defendant in violation of his Fifth and Sixth Amendment rights and in violation of *Miranda v. Arizona*; and (4) an order granting leave to renew or initiate new motions. *See* Dkt. No. 43.

As set forth below, Defendant's motion is denied.

II. BACKGROUND[1]

In a July 26, 2016 search warrant application, New York State Police Investigator Andrew Behrens detailed the results of an investigation, conducted in conjunction with the Columbia County Sheriff's Office, regarding numerous death cases relating to opiate toxicity. *See* Dkt. No. 43-1 at 14-15.[2] During the course of the investigation, three decedents were identified: Shawn Butcher, Lynde Noel, and Sierra Spagnola. *See id.* at 15.

On July 3, 2016, at approximately 4:53 p.m., the New York State Police began an investigation into the death of Shawn Butcher. *See id.* On that date, the State Police responded to an "Echo-Level" EMS call for an unresponsive male, later identified as Shawn Butcher, whom

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[1] Except where otherwise noted, the following factual background is taken from the Court's March 15, 2019 Memorandum-Decision and Order denying Defendant's motion to suppress physical evidence. *See* Dkt. No. 47.

[2] To avoid confusion, anytime the Court references a specific page number for an entry on the docket, it will cite to the page number assigned by the Court's electronic filing system.

was located in a vehicle at the intersection of Concourse and Lake Road in Kinderhook, New York. *See id.* Subsequent to initial lifesaving efforts, the State Police conducted a Vehicle Inventory Search and found a loaded, uncapped syringe on the center console, accompanied by a bottle cap with heroin residue, a filter, and a folded note marked "40," which contained a powdery substance believed to be heroin. *See id.* Additionally, the State Police retrieved a cell phone belonging to Mr. Butcher, identified as an LG Cell Phone bearing serial number 511VTDN0997426. *See id.*

On July 8, 2016, after extensive lifesaving efforts at Albany Medical Center, Mr. Butcher was taken off additional life support and died. *See id.* The New York State Certificate of Death was completed by Dr. Michael Sikirica, who identified the "Manner of Death as Undetermined Circumstances, with the immediate cause being Multisystem Organ Failure due to Anoxic Encephalopathy consistent with Acute Opiate (Heroin) Intoxication." *Id.*

According to the search warrant application, on July 13, 2016, the previously identified cell phone (LG Cell Phone bearing serial number 511VTDN0997426) belonging to Mr. Butcher, was examined by the New York State Police Computer Crimes Unit. *See* Dkt. No. 43-1 at 16. During the initial examination and subsequent extraction report, it was determined that Mr. Butcher had corresponded with contact "E Jake" with the assigned phone number (518)929-4136, which was known and confirmed to be the phone number used by Jacob E. Ebel. *See id.* It was further determined that on July 3, 2016, at approximately 1:47 p.m., Mr. Butcher contacted Jacob Ebel and asked "'I got 40, can you plezzz,' to which Ebel responded 'Yea stop by.'" *Id.* According to Investigator Behrens, based on his training and experience, as well as previous conversations between Butcher and Ebel, "it was determined that Butcher was attempting to purchase forty dollars' worth of heroin." *Id.* It was further relayed that the conversation was

"consistent with the property located by the State Police, on July 3, 2016 within the vehicle occupied by Butcher, consisting of a folded posted note marked '40', which contained a powdery substance believed to be heroin." *Id.*

In the search warrant application, Investigator Behran further explains that on July 9, 2016, at approximately 10:58 p.m., the New York State Police began an investigation into the death of Lynde M. Noel. *See id.* On that date, the State Police responded to 49 June Street, in Kinderhook, New York for a 911 call regarding a possible drug overdose/cardiac arrest of a twenty-seven year old female. *See id.* Ms. Noel was located lying in a prone position unresponsive on the bathroom floor by her sister. *See id.* Ms. Noel was found to be in possession of a hypodermic needle at the time of the incident, consistent with intravenous use of heroin. *See id.* On July 11, 2016, after extensive lifesaving efforts at St. Peter's Hospital, Ms. Noel was taken off of life support and died. *See id.*

On July 20, 2016, the cell phone owned and used by Ms. Noel, identified as LG 32VL, ESN 089394842301253121, was examined by the State Police. *See id.* During the initial examination and subsequent extraction report, it was determined that Ms. Noel had corresponded with telephone number (518)221-7229, which was known to be the phone number used by Kimberly M. Bates. *See id.* at 16-17. It was further determined that on July 9, 2016, Ms. Noel had contacted Ms. Bates just prior to the time of the incident. *See id.* at 17. Investigator Behrens claims that, based on the investigation, his experience, and information obtained by a confidential informant, Ms. Bates was a known associate and sold heroin for Jacob E. Ebel. *See id.*

On July 23, 2016, at approximately 10:47 a.m., the Columbia County Sheriff's Office began an investigation into the death of Sierra M. Spagnola. *See id.* On that date, the Sheriff's Office responded to 8 Sunnyside Road, in Stuyvesant, New York in response to a 911 call

regarding a nineteen-year old female, who was found unresponsive. *See id.* Despite initial lifesaving efforts, Ms. Spagnola was pronounced dead at the scene. *See id.*

During the initial investigation, two yellow and one pink post-it notes were located at the scene containing a powdery substance, consistent with heroin. *See id.* Additionally located at the scene was drug paraphernalia consistent with the use of heroin, as well as a plastic bag containing nine pills. *See id.* As part of the investigation, an interview of Ms. Spagnola's husband, Jeremy J. Spagnola, was conducted to determine the source of the heroin. *See id.* Mr. Spagnola informed the investigators that he and his wife had routinely and consistently purchased heroin only from Jacob Ebel. *See id.* Further, Mr. Spagnola "also specifically stated that within the last month, he personally observed Ebel adding/cutting the heroin with a white powdery substance, which Ebel identified as Fentanyl." *Id.* Mr. Spagnola stated that he most recently purchased heroin from Ebel at his residence, located at 6 Rowland Road, in the Town of Kinderhook. *See id.*

According to the search warrant application, on July 25, 2016, members of the New York State Police and Columbia County Sheriff's Office, met with a confidential informant for purposes of continuing the investigation and specifically conducting a controlled buy of heroin. *See* Dkt. No. 43-1 at 17-18. The confidential informant advised that earlier that day he was contacted by Jacob Ebel from a new phone number identified as (518)339-8812. *See id.* at 18. The confidential informant stated that Ebel expressed remorse for the recent deaths, and invited him to his residence at 6 Rowland Drive. *See id.*

The investigators provided the confidential informant with United States currency consisting of five, twenty dollar bills and recorded the serial numbers. *See id.* Additionally, the informant was supplied with both audio and video recording equipment for the purpose of documenting the transaction. *See id.* Prior to going to 6 Rowland Road, the informant's person

and vehicle were searched. *See id.* Members of the New York State Police then maintained constant visual surveillance of the informant while en route and until entering the residence. *See id.*

According to the search warrant application, the confidential informant was met by Ebel at the entry door to the residence. *See id.* The informant was invited into the residence and while inside, began a conversation about Ebel's supply of Fentanyl being stolen. *See id.* Ebel indicated that the Fentanyl was taken from within the freezer, where he showed the informant what he stated to be ecstasy in the form of frozen popsicles. *See id.* Ebel then provided the informant with a white Xanax pill. *See id.* Ebel directed the informant upstairs to his bedroom, where he was directed to strip out of his clothing and Ebel examined his cell phone. *See id.* Ebel then handed the phone to his girlfriend Judy Perciballi, and directed her to take it out of the room. *See id.* While within Ebel's bedroom, the informant and Ebel agreed for the informant to purchase one-half gram of heroin for $100. *See id.* Ebel then removed a large quantity of heroin from within the headboard of his bed, and weighed out the amount on a digital scale. *See id.* Also located with the heroin was a quantity of cocaine and pills consisting of Adderall and Xanax. *See id.*

The informant provided the $100 in United States currency and was given the heroin in a plastic shopping bag. *See id.* at 19. Prior to leaving the residence, Ebel directed that the informant return the heroin, stating that he was going to hide it due to the arrival of State Police personnel at the residence. *See id.* Ebel maintained possession of the currency and the heroin which he had sold to the informant. *See id.* The search warrant application indicates that a "portion of this transaction was documented through audio/video digital media, which corroborate and substantiate the informants' [sic] account of same." *Id.*

Based on the information provided, on July 26, 2016, Columbia County Supreme Court Judge Jonathan Nichols issued a search warrant for the property at 6 Rowland Road in Kinderhook, New York. *See id.* at 11-12. Later that same morning, the search warrant was executed by members of the New York State Police and other law enforcement personnel. *See id.* Following the execution of the warrant, Defendant was taken into custody and driven to the State Police barracks in Livingston, New York. *See* Dkt. No. 43-2 at 1.

According to Defendant, at approximately 4:04 a.m., he was escorted out of his residence and placed in the back of a law enforcement vehicle.[3] *See* Dkt. No. 53-1 at 2. Defendant claims that he had no shirt or shoes and that he was handcuffed behind his back. *See id.* "For approximately the next thirty-five minutes, Mr. Ebel drove with law enforcement to the Livingston Barracks in Hudson, New York. Throughout the ride, Mr. Ebel complained that they were traveling in the middle of nowhere, that he was cold, that he was thirsty, that his handcuffs were hurting him, that his wrists were 'on fire', that the handcuff[s] were 'like murder', that he wanted a cigarette, and otherwise that he was uncomfortable almost the entire ride." *Id.* at 2-3.

During the transport, Defendant repeatedly initiated conversations with the Investigators Behrens and Anderson, who responded to his questions but did not otherwise interrogate him. Approximately eight minutes into the ride, Defendant commented, unprompted, "some girl commits suicide and now I get f******* blamed for it?" Audio Rec. at 7:59. Approximately twelve minutes into the ride, Defendant asked "when do I get to talk to a lawyer?" *Id.* at 12:13. Investigator Behrens responded, "we're gonna talk about it." *Id.* at 12:13. Defendant did not

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[3] Upon placing Defendant in the rear of the law enforcement vehicle, Investigator Behrens and Columbia County Sheriff's Investigator Reagan Anderson turned on an audio recorder that recorded continuously while Defendant was being transported to the State Police Troop K Barracks in Hudson, New York. Defendant attached as an exhibit a copy of this recording to the pending motion.

bring up the subject again and went back to discussing subjects such as the tightness of the handcuffs, how long it would take to reach the barracks, and the treatment of his mother and then-girlfriend.

About twenty-five minutes into the ride, Defendant made the unprompted suggestion that he could help out the police, though he noted that the large law enforcement presence at his house would make it difficult for him to become an informant. *See id.* at 25:10-26:00. Thereafter, Defendant again indicates that he would be willing to talk with the investigators, particularly if he could have a cigarette. *See id.* at 31:50-32:20. Immediately upon arriving at the State Police barracks, while still in the vehicle, the investigators administered *Miranda* warnings. *See id.* at 32:33. The exchange between Investigator Behrens and Defendant went as follows:

> **Behrens**: Jake, you know, obviously you know, I always make it a practice when I'm gonna talk with somebody, I always advise 'em of their rights, just like you hear on TV, like your *Miranda* warning, you know?
>
> **Ebel**: Sure, sure.
>
> **Behrens**: Alright, so-
>
> **Ebel**: I'm under arrest-
>
> **Behrens**: Yep, exactly-
>
> **Ebel**: But I could be placed out of arrest, correct?
>
> **Behrens**: Right.
>
> **Ebel**: Ok.
>
> **Behrens**: But, you know, what your *Miranda* warnings – they talk about you have the right to remain silent. And anything you say can and will be used against you in a court of law.
>
> **Ebel**: Yeah, yeah.
>
> **Behrens**: You have a right to talk to a lawyer.

Ebel: Yeah.

Behrens: And have your lawyer present with you while you're being questioned.

Ebel: [indecipherable] when you go to jail, yep. Uh-huh.

Behrens: You know.

Ebel: Right. I know all, all about it. I know everything.

Behrens: You know, if you can't afford to hire a lawyer, one will be appointed to represent you free of charge before any questioning.

Ebel: Sure, sure, been there, yeah.

Behrens: And you may decide at any time to exercise those rights to not answer any questions, right, or make any statements. Do you understand those rights though?

Ebel: Yeah.

Behrens: As I've explained them to-

Ebel: Everything. I understand everything you're saying sir.

Behrens: Alright. Well having those rights in mind, do you wish to talk to us about what's going on, how we came to be here?

Ebel: I would like to talk.

Behrens: Ok. Well I would like to too, obviously.

See Audio Rec. at 32:33-33:40.

Currently before the Court is Defendant's motion to suppress.

III. DISCUSSION

A. Suppression of Defendant's Statements

1. Standard

"In *Miranda v. Arizona*, the Supreme Court made clear that the prosecution may not use

statements made by a suspect under custodial interrogation unless the suspect (1) has been apprised of his Fifth Amendment rights, and (2) knowingly, intelligently, and voluntarily waives those rights." *United States v. Oehne*, 698 F.3d 119, 122 (2d Cir. 2012) (citing *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). "The Supreme Court later crafted a prophylactic rule to protect suspects from being pressured into waiving *Miranda* rights after invoking them, holding that 'an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *Id.* (quoting *Edwards v. Arizona*, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). "For a suspect to invoke his *Miranda* right to counsel, he must at a minimum make 'some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation.'" *Id.* at 122-23 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991)) (emphasis omitted). "'If an accused makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights.'" *Id.* at 123 (quotation omitted). "Statements such as: 'Maybe I should talk to a lawyer,' *Davis v. United States*, 512 U.S. 452, 462, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (internal quotation marks omitted); 'Do you think I need a lawyer?' *Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996); and a suspect's statement that he 'was going to get a lawyer,' *United States v. Scarpa*, 897 F.2d 63, 68 (2d Cir. 1990), have been found to be insufficient to constitute an unambiguous request for counsel." *Oehne*, 698 F.3d at 123. "Similarly, the Supreme Court has held that an accused who wants to invoke his or her right to remain silent must do so

unambiguously." *Id.* (citing *Berghuis*, 130 S. Ct. at 2260).

When a defendant moves to suppress a statement that he claims was obtained in violation of *Miranda*, the government has the burden of proving by a preponderance of the evidence that the statement was made after a voluntary, knowing and intelligent waiver of the defendant's *Miranda* rights. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986); *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991) (citation omitted). For a waiver to be voluntary, the waiver must have been "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran*, 475 U.S. at 421. In addition, for a defendant to make a knowing and intelligent waiver, he must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*; *see also United States v. Taylor*, 745 F.3d 15, 23 (2d Cir. 2014) ("'[K]nowing' means with full awareness of the nature of the right being abandoned and the consequences of abandoning it, and 'voluntary' means by deliberate choice free from intimidation, coercion, or deception"). However, the accused need not "know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). Instead, the accused need only be aware that "he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Id.*

Both the waiver and subsequent statement must be knowingly and voluntarily made. Generally, a suspect who reads, acknowledges, and signs a waiver form before making a statement has knowingly and voluntarily waived *Miranda* rights. *See United States v. Plugh*, 648 F.3d 118, 127-28 (2d Cir. 2011). In assessing the defendant's comprehension and voluntariness of the waiver, the court must look to the totality of the circumstances. *See id.* This includes the characteristics of the defendant, *i.e.*, background, experience, and conduct, the setting

surrounding the statement, and the conduct of the officers. *See North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979); *see also Taylor*, 745 F.3d at 23-24. Other relevant factors include the defendant's age, education, and intelligence, failure to give *Miranda* warnings, length of detention, nature of the interrogation, and use of physical punishment. *See United States v. Guarno*, 819 F.2d 28, 30 (2d Cir. 1987) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)).

Indirect or general promises of leniency usually are not enough to render a confession involuntary. "In assessing the totality of the circumstances, vague promises of leniency for cooperation are just one factor to be weighed in the overall calculus and generally will not, without more, warrant a finding of coercion." *United States v. Gaines*, 295 F.3d 293, 299 (2d Cir. 2002) (finding a statement voluntary where the government agent said the prosecutor and judge would be made aware of the defendant's cooperation); *United States v. Romano*, 630 Fed. Appx. 56, 58-59 (2d Cir. 2015). On the other hand, falsely promising specific favorable treatment when the questioner does not intend to honor the promise may cross the line and overcome a defendant's will to remain silent. *See Ruggles*, 70 F.3d at 265.

And sometimes, even falsity is not enough: not all "[p]loys to mislead a suspect or to lull him into a false sense of security" are necessarily coercive. *United States v. Pryor*, 474 Fed. Appx. 831, 835 (2d Cir. 2012) (quoting *Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990)). Ultimately, although law enforcement's affirmative misrepresentations could be coercive enough to render a defendant's statement involuntary, *United States v. Anderson*, 929 F.2d 96, 100 (2d Cir. 1991) (discussing waiver of the Fifth Amendment privilege), a statement should not be suppressed where a defendant merely "was moved to cooperate, rather than coerced." *United States v. Corbett*, 750 F.3d 245, 253 (2d Cir.

2014). Simply stated, the question is whether a promise is false and specific enough to coerce a defendant to confess against his will. In the words of the Second Circuit, an officer's touting "unfulfillable promises or certain other misrepresentations . . . might render a confession involuntary," largely "because they overcome his desire to remain silent." *Gaines*, 295 F.3d at 299.

2. Application

In his motion, Defendant argues that he invoked his right to counsel when, during the ride to the State Police barracks, he asked the investigators "when do I get to talk to a lawyer?" Dkt. No. 53-1 at 5. Defendant contends that, rather than provide him with an attorney, while still in the vehicle and only twenty minutes after invoking his right to counsel, "law enforcement attempted to have him waive his rights by offhandedly talking about *Miranda* warnings 'just like you hear on TV.'" *Id.* Defendant argues that "this was a complete sidestepping of [his] invocation of his right to counsel and should not be allowed." *Id.*

While Defendant takes issue with Investigator Behrens accurate statement that he was administering *Miranda* warnings just like one would see on television, Defendant does not claim that Investigator Behrens misstated or omitted anything from the standard *Miranda* script. Nor does he claim that interrogation began prior to the administration of *Miranda* warnings.

Initially, the Court finds that Defendant's pre-interrogation statement "when do I get to talk to a lawyer?" was not an invocation of his right to counsel. This statement, assessed in its necessary context, was "ambiguous or equivocal" in that he only "*might* be invoking the right to counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994) (emphasis in original). Courts have similarly found that a defendant declaring that he "was going to get a lawyer" to be insufficient to invoke the right. *See Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996); *United States v. Scarpa*,

897 F.2d 63, 68 (2d Cir. 1990); *United States v. Plugh*, 648 F.3d 118, 125-27 (2d Cir. 2011) ("Plugh's only statements — 'I am not sure if I should be talking to you' and 'I don't know if I need a lawyer' — were appropriately deemed ambiguous"); *United States v. Battle*, No. 5:13-cv-38, 2013 WL 5769982, *12-*13 (D. Vt. Oct. 24, 2013) (holding that the statement was ambiguous where the defendant stated "I just want a lawyer and all that but, you know, you can still talk to me without one here"); *United States v. Lights*, 208 F. Supp. 3d 568, 575-76 (S.D.N.Y. 2016).

As the Government correctly argues, Defendant's "when do I get to talk to a lawyer?" was not an unambiguous invocation of his right to counsel. It was not a declaration as to intent or desire, but simply a question about timing. It was no more definitive than "[m]aybe I should talk to a lawyer" from the Supreme Court's decision in *Davis*, or the defendant's statement in *Scarpa* that he "was going to get a lawyer." As such, Defendant's question did not foreclose the possibility that Defendant would speak to the investigators outside of a lawyer's presence.

Even assuming that Defendant had made an unambiguous invocation of his right to counsel, which he did not, Defendant's statements would still not be subject to suppression. After Defendant raised the question regarding counsel, Defendant continued making unprompted statements to the investigators. Thirteen minutes after asking about when he would be able to speak with an attorney, Defendant made an unprompted offer to speak and cooperate with the investigators. As such, even "assuming *arguendo* that the initial invocation was unambiguous, it was overridden by [Defendant's] subsequent decision to reinitiate the conversation" with the investigators. *See United States v. Gonzalez*, 764 F.3d 159, 166 (2d Cir. 2014); *see also Connecticut v. Barrett*, 479 U.S. 523 (1987) (noting that the defendant's "limited requests for counsel, however, were accompanied by affirmative announcements of his willingness to speak with authorities. ... *Miranda* gives the defendant a right to choose between speech and silence,

[the defendant] chose to speak").

After arriving at the State Police barracks, Defendant unequivocally confirmed his intent to speak with investigators and formally waived his *Miranda* rights. Although Defendant takes issue with the informal manner in which Investigator Behrens began informing Defendant of his rights, the audio recording makes clear that Defendant was accurately informed of each of his rights. Investigator Behrens did not downplay the significance of the warnings, deviate from an accurate account of the standard *Miranda* warnings, or misinform Defendant regarding any of his rights. As such, the evidence before the Court makes clear that Defendant knowingly waived his rights.[4]

Further, Defendant has not pointed to any facts suggesting that his statement was involuntary. Initially, as the Government correctly notes, Defendant did not submit an affidavit attesting to the conditions that he alleges were coercive and factual statements made by counsel, as opposed to statements by a defendant under oath, do not create issues of fact. *See United States v. Gillette*, 383 F.3d 843, 848-49 (2d Cir. 1967). Therefore, the audio recording is the only competent evidence before the Court. This audio recording clearly establishes that, while he was intoxicated, Defendant was coherent and fully alert to his surroundings. He continually questioned the investigators and ultimately agreed to cooperate before he was questioned or *Mirandized*. The conditions about which Defendant complains – being cold, intoxicated, tight handcuffs – do not, individually or collectively, come close to establishing coercion or that Defendant's will was overborne. *See United States v. Vallar*, 635 F.3d 271, 284 (7th Cir. 2011);

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[4] To the extent that Defendant is attempting to argue that the *Miranda* warnings were defective, his argument is without merit. *See United States v. Vega-Arizmendi*, Cr. No. 2016-0009-13, 2017 WL 132844, *7 (D.V.I. Jan. 12, 2017); *see also Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir. 2011) (*en banc*).

United States v. Burson, 531 F.3d 1254, 1258-59 (10th Cir. 2007); *United States v. Wyche*, 307 F. Supp. 2d 453, 463-64 (E.D.N.Y. 2004).[5]

Based on the foregoing, the Court finds that Defendant knowingly and intelligently waived his *Miranda* rights and his motion to suppress is denied on this ground.

B. Sixth Amendment

In his motion, Defendant contends that his statement was obtained "in violation of his Sixth Amendment right to counsel[.]" Dkt. No. 53-1 at 3. "Attachment of the Sixth Amendment right to counsel occurs 'only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing.'" *United States v. Gumaer*, ___ Fed. Appx. ___, 2019 WL 1503993, *5 (2d Cir. Apr. 5, 2019) (quoting *United States v. Gouveia*, 467 U.S. 180, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984)). Since Defendant had not yet been charged with a crime or appeared before a judicial officer, Defendant's rights under the Sixth Amendment had not yet attached and there necessarily could not have been a Sixth Amendment violation. As such, Defendant's motion on this ground is denied.

C. Request for a Hearing

In his motion, Defendant requests the Court to conduct an evidentiary hearing. Such a hearing is not warranted in the present matter. Defendant failed to identify an specific issues of fact that must be resolved through testimony. *See United States v. Getto*, 729 F.3d 221, 227 n.6 (2d Cir. 2013). Rather, the audio recording is clear and not contradicted by any other evidence before the Court. Based on the foregoing, the Court denies Defendant's request for an evidentiary hearing.

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[5] The Court also notes that the recording demonstrates that the investigators were unfailingly polite to Defendant throughout both on the way to and once they arrived at the State Police barracks.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's motion to suppress (Dkt. No. 53) is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: June 5, 2019
Albany, New York

Mae A. D'Agostino
U.S. District Judge